IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 24, 2007 Session

WILLIAM S. MATHIAS v. PAMELA SUE MATHIAS

Direct Appeal from the Circuit Court for Hamilton County
No. 05-D-131 Hon. Jackie Schulten, Circuit Judge

No. E2006-02294-COA-R3-CV - FILED FEBRUARY 28, 2008

In this divorce action the Trial Court granted the parties a divorce, awarded the wife attorney's fees and expenses and periodic alimony. The Trial Judge also divided the extensive marital estate between the parties. The husband has appealed and raised issues as to the award of alimony, attorney's fees and the division of the marital estate. We affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Michael E. Richardson and Cara Alday, Chattanooga, Tennessee, for appellant.

Glenna M. Ramer, Chattanooga, Tennessee, for appellee.

OPINION

This appeal arises out of a divorce proceeding and concerns the Trial Court's division of marital property and awards of alimony and attorneys fees. Plaintiff/wife, filed a complaint of divorce on January 5, 2005, based on irreconcilable differences or, alternatively, inappropriate martial conduct. Pre-trial, the Court awarded plaintiff temporary alimony of $2,000.00 a month. Both parties submitted their lists of martial assets and proposals as to how it should be divided. The marital assets listed on both submissions included five pieces of real property, four businesses, the settlement proceeds of a lawsuit involving one of the businesses, three retirement accounts, home

furniture and goods, three cars, a ski boat and trailer, an ATV and trailer and a tractor.

At trial each party presented expert testimony regarding the value of the businesses, and the fair market value of four of the five properties. The parties' experts were in conflict over the valuation of the four businesses at issue.

Following the trial, the Trial Judge issued a Memorandum Opinion finding that both parties were at fault in the divorce, the higher portion of fault was attributed to the defendant. She awarded $3,500.00 per month in periodic alimony to plaintiff and found that defendant's income was over $200,000.00 annually, and if business expenses were taken off of his income and expense statement, his total compensation was closer to $300,000.00 a year.

The Trial Court found values to the various properties, divided the marital properties between the parties, and awarded the wife attorney's fees and litigation costs.

Numerous issues have been raised on appeal:

1. Whether the Trial Court erred in allowing the testimony of Ms. Mathias' business expert, Rhonda Champion, and in accepting Ms. Champion's valuation of the businesses?

2. Whether the Court erred in its valuation of the real estate?

3. Whether the Court erred in its valuation of the personal property?

4. Whether the Court erred in awarding $3,500.00 per month to Ms. Mathias in periodic alimony?

5. Whether the Court erred in awarding Ms. Mathias $15,000.00 for her legal fees and $5,795.00 for her expert witness fees and other litigation related expenses?

6. Should Ms. Mathias be awarded attorney's fees for this appeal?

We review the trial court's findings of fact in a divorce case *de novo* with the presumption that the trial court's factual determinations are correct unless the evidence preponderates against such factual determinations. *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn.1999). In *Sandlin v. Sandlin* we discussed the deference our Court gives to a trial court's findings regarding alimony, distribution of marital property and awards of attorneys fees in divorce cases as follows:

> The amount of alimony to be allowed in any case is a matter for the discretion of the trial court in view of the particular circumstances, for the appellate courts are

> disinclined to review such discretion except in cases where it has manifestly been abused." *Hanover v. Hanover,* 775 S.W.2d 612, 617 (Tenn. Ct. App.1987) (citing *Ingram v. Ingram,* 721 S.W.2d 262 (Tenn. Ct. App.1986)). "This Court customarily gives great weight to decisions of the trial court in dividing marital estates and we are disinclined to disturb the trial court's decision unless the distribution lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures." *Herrera v. Herrera,* 944 S.W.2d 379, 389 (Tenn. Ct. App.1996) (citing *Wade v. Wade,* 897 S.W.2d 702, 715 (Tenn. Ct. App.1994)). The trial court's award of attorney's fees "to a party in a divorce proceeding is within the sound discretion of the trial court and will not be disturbed upon appeal unless the evidence preponderates against such a decision." *Storey v. Storey,* 835 S.W.2d 593, 597 (Tenn. Ct. App.1992) (citing *Batson v. Batson,* 769 S.W.2d 849, 862 (Tenn. Ct. App.1988)).

Sandlin v. Sandlin, No. M2003-00775-COA-R3-CV, 2004 WL 1237273 at *2 (Tenn. Ct. App. June 3, 2004).

On appeal, the husband claims the Trial Court erred by allowing the testimony of the wife's economic expert Rhonda Champion because she was not qualified to offer her opinions regarding the value of the four businesses at issue. The husband, in his brief, claims to have objected at trial to Ms. Champion's qualifications "on the basis that there had not been a sufficient foundation laid as to her testimony as an expert." A review of the record demonstrates that the husband's counsel did not object to Ms. Champion's qualifications regarding her review and critique of Mr. Fitch's report[1] or her placing a value on the four businesses by analyzing their cash flow. Counsel only objected to Ms. Champion's testimony regarding a potential buyer's perspectives. Specifically counsel objected as follows:

> Mr. Richardson: Your Honor, I'm going to object to this testimony. I don't think there's been a foundation laid that she's an expert in the buy and sale of these type of businesses. I thought she was here to give a value based upon her analysis of the tax returns. I don't think she's qualified to give opinions about what a purchaser may think about these particular companies.
>
> Ms. Ramer: She's just - - Your Honor, if I might respond to the Court, she's simply giving her rationale for excluding Chill Water Solutions as part of the valuation.
>
> The Court: That's all I saw. I don't think she - -
>
> Mr. Richardson: Well, I understand. Okay. I still don't think there's a foundation laid to her giving her opinions about purchasers' perspectives.

[1] The husband's financial expert.

Champion's business valuation set forth in her testimony and in her report is based on her review of Mr. Fitch's report and the financial data submitted by the husband, including the tax returns. Counsel for the husband clearly accepted Ms. Champion's qualifications as sufficient to testify on that issue. Because the husband's objection to Champion's qualifications was limited to her expertise on the motivations of potential buyers, he failed to raise at trial an objection to her qualifications to value the businesses based on cash flow and this issue may not be raised on appeal. *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn.1983).

The Trial Court accepted Champion's value of $324,025.00, and it is well established that "[w]hen expert testimony differs, it is within the discretion of the trial judge to determine which testimony to accept." *Burden v. Burden*, E2006-01466-COA-R3-CV, 2007 WL 2790694 at *12 (Tenn.Ct. App. Sept. 26, 2007)(citing *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004). The evidence does not preponderate against the Trial Court's finding on this issue. We affirm that the fair market value of the businesses was as found by the Trial Court.

Next, the husband disputes the Trial Court's valuation of four of the five pieces of real estate at issue as marital assets.[2] The general rule regarding the value of a marital asset is that the court considers all relevant evidence regarding its value; the parties bear the burden to present competent evidence of its value and are bound by the evidence they present and; that the trial court has the discretion to place a value on a marital asset that is within the range of the evidence submitted. *Koch v. Koch*, 874 S.W.2d 571, 577 (Tenn. Ct. App.1993). The valuation of a marital asset is a question of fact, thus there is a presumption that the trial court's valuation is correct. *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. App.1987). If there is a dispute as to the value of an asset, the trial court has the opportunity to observe the parties and witnesses as they testify, and the trial court's resolution of any conflict in the testimony that rests on the credibility of witnesses is entitled to great weight. *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47, 49 (1959).

The husband contends the Trial Court erred when it valued the marital home, which was awarded to him, as a marital asset of $127, 561.00. The Trial Court accepted the testimony and report of real estate appraiser William Haisten who placed a fair market value on the Harrison property of $695,000.00. The Court then subtracted the amount of the mortgage on the property, a figure provided by the husband, and came up with the marital asset of $127, 561.00. The husband argues the court should have deducted $82,060.00 from the final number as that is the cost of repairs to the pool, deck, dock and roof of the house which he plans to have done. This argument fails because the appraiser, who was retained by Mr Mathias himself, testified that he considered that the pool, deck, dock and roof needed to be repaired when he assigned the fair market value of $695,000.00 to the property. No other expert testimony was presented on the value of the Harrison property. In light of the testimony of Haisten, we hold the evidence does not preponderate against the Trial Court's finding on this issue.

[2] The valuation of the Waverly property is not in dispute on appeal.

The husband contends that the evidence at trial established two different fair market values for the Lewter Farm, the value of the farm as it was the day of trial and the value of the farm based on a proposed subdivision. The trial court specifically ruled that she considered the Lewter farm as it stood on the day of trial and that the defendant could make an offer of proof regarding the possibility of subdivision. Thus, the question is whether the Trial Court erred in not permitting testimony regarding the fair market value of the farm based on the proposed subdivision. The Trial Court assigned the value of the farm as it stood the day of trial at $415,000.00 instead of the value in the offered proof of over a million dollars on a speculative subdivision of the property. Generally, the admissibility of evidence is within the sound discretion of the trial court. *Otis v. Cambridge Mut. Fire Ins*. Co., 850 S.W.2d 439, 442 (Tenn.1992), and we review the Court's decision not to admit evidence as an abuse of discretion. The General Assembly has directed that "marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property". Tenn. Code Ann. § 36-4-121(b)(1)(A), *Koch*, 874 S.W.2d 571, 576 (Tenn. Ct. App. 1993) . As of the date of trial, the Lewter farm stood unsubdivided and improved by only one house and one barn. As such, it was appraised by Colin Wakefield at $415,000.00. For the Trial Court to have allowed the testimony of Mr. Wakefield regarding the value of the farm if it were to be subdivided sometime in the future would have been improper under the statute. The proposed subdivision valuation was speculative at best. *Jones v. Jones*, No. 87-64-1, 1987 WL 13006 at *5 (Tenn. Ct. App. June 26, 1987). Wakefield, in the proffered portion of his deposition, admitted that his second appraisal was based on a "preliminary" survey; that his estimate of the cost of development, such as roads, drainage and utilities, was "ball park" and not specific; that there were low lying or swampy areas on the farm and that two out of three comparable subdivisions he had used in his appraisal were selling poorly and did not appear to be financially feasible. He characterized his task in creating the second appraisal as " [w]e were just trying to determine, I guess, an estimated potential value per lot . . . for that property if it were subdivided". Based on the statutory directive to value property as of the date of trial, the uncertainties in Mr. Wakefield's testimony and the speculative nature of the proposed subdivision, the Trial Court did not abuse its discretion in excluding any evidence about the value of the farm if it were subdivided.

Next, the husband contends the Trial Court erred in not assigning a value to the timber growing on sixteen acres of the Lewter farm and by not crediting the value of the timber to the wife as a marital asset. The husband provided three values to the timber. At trial he stated it was worth $30,000.00; his Statement of Assets and Liabilities filed the day of trial valued it at $28,950.00, and his July 20, 2005 Statement of Assets listed the timber's value as $20,000.00. He offered no valuation from experts. The wife did not list the timber on her Statement of Assets and Liabilities as a separate asset, and presented no testimony on the issue. The appraiser Wakefield stated he did not consider the value of the timber when he appraised the Lewter farm.

The Trial Court did not address the timber issue in her Memorandum Opinion or assign it as a separate asset to either party. Assuming *arguendo* that the Trial Court did not include the value of the standing timber in her finding of value and award of the property to the wife, the value of this timber in the $20,000.00 range, if added to the value of the farm, would not render the

overall award of the marital estate to the wife inequitable.

Mr. Mathias contends that the Trial Court erred in establishing the marital equity of the Decatur property. Both parties accepted the appraised value of the property as $400,000.00. However, they differed on the loan balance for the line of credit which encumbered the property. The husband testified that the line of credit varied between $50,000.00 and $200,000.00 but he did not testify as to the balance at the time of trial. He listed in his Statement of Assets and Liabilities that the loan balance was $196,446.00 but he did not present any documentation of this figure and the meaning of his testimony that the line of credit "went from $50,000.00 to $200,000.00" is not clear. The wife put the encumbrance on the property as $107,035.00 in her statement of Marital Assets but she likewise did not produce documentation to support this figure nor did she testify about it. The Trial Court, was placed in the position of having to deal with the conflicting values set forth in the parties' statements of marital assets and the lack of specific testimony at trial by splitting the difference between the two and assigned a marital equity value of $248,260.00 and awarded it to the husband. On this record, the evidence does not preponderate against the Trial Court's evaluation. *Smith v. Smith*, 912 S.W.2d 155, 157 (Tenn. Ct. App.1995).

The husband also disputes the Trial Court's valuation of the Gatlinburg timeshare. The wife did not testify regarding her valuation of the timeshare. She listed its value on her statement of assets as $10,116.00, which was the purchase price in 1998. The husband valued the timeshare as $5,000.00 on his statement and he testified that he had reached this number based on his experience in trying to sell the timeshare. When he was asked by his counsel how he reached his conclusion on market value he simply said "[e]very time I tried to sell it with a Realtor, that's the price that I got that they would be willing to pay for it". The Trial Court again split the difference between the parties' valuation of the timeshare and placed a value of $7,500.00 on it and awarded it to the husband. The Trial Court, in its discretion, is free to place a value on a marital asset that is within the range of the evidence submitted. *Brock v. Brock,* 941 S.W.2d 896, 902 (Tenn. Ct. App.1996). Here, the Trial Court obviously did not find credible the husband's statement that he had been told by an unidentified "they" that the timeshare was only worth $5,000.00.

The husband contends the Trial Court erred because it valued and assigned to him several marital assets that were sold before the divorce. The wife's statement of Marital Assets included two new Sea Doos (jet skis) and their trailer valued at $15,000.00 and a Polaris 700 ATV and its trailer which she valued at $5,000.00. The husband did not include these items on his statement. Neither party testified regarding these items nor was any other evidence or argument connected with them. The Trial Court accepted the wife's valuation and awarded the assets to the husband. The husband on appeal claims that these items were sold by him prior to the trial, and are no longer marital assets. To support this statement, he points to a "note" at the very end of his Statement of Assets and Liabilities wherein he explains his actions as follows:

Notes:

1. We sold our jet skis early in 2005 to David Stagman for $8,000.00 because

I needed the cash to help pay Pamela's moving expenses and apartment deposit.

2. I sold the Polaris 700 to Louise Mathias in the summer of 2005 for $2,000.00 to help pay for Pamela's alimony.

There are three problems with his position. One, the Complaint of Divorce, filed on January 5, 2005 was accompanied by a statutory injunction enjoining both parties from transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the Court, of any marital property pursuant to Tenn. Code Ann. 36-4-106(d). If the husband sold these items without the consent of his wife after January 5, 2005, he was in violation of the injunction, no matter what his reasons for the transfers. The was no evidence at trial that the wife consented to the sales. Moreover, the husband did not bring this issue before the Court at trial with testimony or argument. He was on notice prior to trial that the wife claimed that these vehicles were part of the marital assets, and even if the "note" included in his statement of assets and liabilities was sufficient to satisfy the requirement that the issue must be raised at trial to be considered on appeal, he cannot prevail with his argument that the vehicles were not marital property. By statutory definition these items were marital property. Tenn. Code Ann. § 36-4-121 provides for the distribution of marital property in a divorce action. Section 36-4-121(b)(1)(A) defines marital property as:

> "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

Neither the "note" in the Statement of Assets and Liabilities nor the appellant's brief argue that the vehicles at issue were not owned by both spouses at the time of the filing of the complaint. The Court correctly treated these items as marital property, and the fact that the husband improperly disposed of these items does not change their status as marital property at the time the complaint was filed. Based on the evidence presented on this issue, the husband violated the injunction, and the fact that, although his "note" claims he sold the vehicles to raise money for alimony, he was found in contempt for not paying alimony. The Trial Court's decision to value the vehicles at $20,000.00 and to award the value of these assets to the husband was not error.

The Trial Court assigned a Sun Trust checking account valued at $38,000.00 to the husband. This checking account with its value of $38,000.00 was included on the wife's statement of assets but the husband did not include this item on his statement. No other evidence was offered at trial regarding this account. On appeal, the husband contends that the Court's assignment of the

checking account to him was error because "the parties did not have a Sun Trust checking account in the amount of $38,000.00. There was no proof at trial as to the existence of the $38,000.00 checking account. The Court awarded the husband the non-existent $38,000.00 checking account". Significantly, the husband does not assert that the parties did not have a Sun Trust checking account at all or that they had such an account but only that the $38,000.00 figure is higher or lower than the amount actually in the account. The Trial Court was again confronted with no testimony in the record about this account, but it was set forth as an item on the wife's Statement of Assets and Liabilities, and awarded it to the husband. Based on the record before us, there is no evidence in the record to preponderate against this finding.

The husband claims that the Trial Court erred when it valued certain personal and household items awarded to him but failed to credit the wife with the value of personal and household items awarded to her, including the family china, crystal and silver.

The wife's Statement of Marital Assets and Liabilities lists the household goods and furniture located at the Harrison home as valued at $27,350.00 and the household goods and furniture located at her Nashville apartment as valued at $5,000.00. Furniture that was stored at Mrs. Louise Mathias' home was valued at $10,000.00. The husband, on his Statement of Assets and Liabilities, valued the personal property allotted to him (presumably located in the Harrison home) at $27,000.00 and the personal property allotted to the wife at $20,000.00. The personal property at the Harrison home had been appraised by Sunny Wagner and valued at $27,350.00. Wagner's written appraisal was entered into evidence as by stipulation of the parties, and the personal property located at the Nashville apartment and at Ms. Louise Mathias' home apparently was not appraised. At trial, the husband testified that some of the property included in the Wagner appraisal was business furniture, valued at $2,845.00 and some of the furniture included in the appraisal was "our daughter's bedroom furniture." He stated that the bedroom furniture was valued at $3,075.00. No further evidence was presented to the Trial Court regarding the issue of the valuation of household goods and furniture. In fact, the husband's counsel indicated to the Court that the parties would attempt to resolve any remaining issues regarding the valuation and division of personal property among themselves as follows:

> Mr. Richardson: Your Honor, what we've done, Ms. Ramer had a list of what Pamela wants, most of which he's agreeable to. There's three or four items he's not agreeable to, so maybe we can resolve that.
>
> The Court: Okay.
>
> Mr. Richardson: I know you don't want to hear about TVs and potted plants.
>
> The Court: You're right.
>
> The Witness [Mr. Mathias] I don't blame you.

Mr. Richardson: Let's move on.

The Trial Court assigned a marital equity of $27,000.00 to the home furnishings and goods located at the Harrison home, presumably accepting the Wagner appraisal and the Statements of Assets and Liabilities of both parties. The Trial Court split the difference between the parties' valuation of the furniture in the Nashville apartment and at Ms. Louise Mathias' home and valued this furniture, which was awarded to the wife at $17,500.00. Additionally, the Trial Court awarded the family china, crystal and silver to the wife, but did not place a value on it. Notably there was no evidence as to the value of the china, crystal and silver.

The husband claims the Trial Court should have deducted $2,495.00 the Wagner appraisal attributed to business furniture and $ 3,075.00 attributed to his daughters' furniture from the $27,000.00 of marital equity credited to him for personal property at the Harrison home. In support of his argument that the business furniture should not have been included in this valuation, he points to Mr. Fitch's testimony that he included hard assets such as equipment and furniture in his valuation of the Mathias business interests. While Fitch did testify generally that he included the hard assets of the companies in his valuation, he never specified whether he included furniture and equipment located at the marital home. Nor did the husband specify what items in the Wagner appraisal he believed should have been allocated as belonging to the business. Due to the lack of evidence on this issue, we defer to the Trial Court's finding that the value of the marital equity in the personal property at the Harrison home was $27,000.00.

Next, the husband argues that the value of the daughters' bedroom furniture should have been subtracted from the $27,000.00. Again, the testimony on this issue was sparse. There was no testimony that the furniture at issue was not acquired by the parties during the marriage, nor was there any testimony that the furniture was acquired by the daughters independently of the parents. The husband simply failed to produce any evidence that would justify deducting the value of this furniture from the $27,000.00 assigned to him as martial equity. *See Watters v. Watters,* 959 S.W.2d 585 at 589 (Tenn.Ct. App.,1997).

Next, the husband asserts that the Trial Court erred by not assigning a value to the china, crystal and silver it awarded to the wife. This issue was not brought up at trial by the husband and will not be considered by this Court on appeal. *Gross v. McKenna*, E20050024880COA-R3-CV, 2007 WL 3171155 at *4(Tenn Ct. App. October 30, 2007).

Both parties agreed that the unpaid settlement proceeds due MM&S from a lawsuit against Volunteer Metal Systems was $100,000.00 to be paid in two installments of $50,000.00 each. The Trial Court awarded the settlement proceeds to the wife as part of her marital equity. The husband claims that this award was error because the settlement proceeds were a business asset of MM&S and not subject to distribution as a marital asset. We find this argument to be without merit. Both parties listed the Mathias business entities, including MM&S, as marital assets in their Statements of Assets and Liabilities and both parties presented evidence at trial through expert CPA's regarding the valuation of the business entities. The husband never objected to the Trial Court's assignment of the business entities as marital equity and he has not appealed this assignment.

It follows, that the settlement proceeds due MM&S are part of the marital estate, as are all the other assets and liabilities of the Mathias business entities. The husband also asserts in his brief that the settlement proceeds were included by Mr. Fitch in his valuation of the businesses. However, no citation to Fitch's report or testimony is supplied by defendant to support this statement, and a review of the report and testimony of Fitch does not reveal any basis for this assertion.[3]

Next, the husband contests the Trial Court's distribution of marital assets and liabilities. The Court awarded $1,002,111.00 of assets to the wife, and $1,000,254.00 of assets to the husband. The award of assets are almost equal, but the husband argues that the results are skewed because the Court undervalued the assets attributed to the wife and overvalued the assets assigned to him. "The trial court's decision should not be found to be inequitable just because the division of property is not completely equal". *Brown,* 913 S.W.2d at 168. The trial court has wide latitude in fashioning an equitable division of marital property, and appellate courts give great weight to a trial judge's decision on this issue. *Kinard v. Kinard,* 986 S.W.2d at 229-230 (Tenn. Ct. App. 1998).

Next, the husband contends the Trial Court erred when is assigned $50,470.00 of liabilities to himself and $33,281.00 of liabilities to the wife. The husband contends that he had a significant amount of marital liabilities that the Court disregarded. Specifically, he argues the Trial Court was in error when it disallowed $27,344.00 he claimed for attorneys fees, expert fees, and appraiser fees associated with the divorce because these expenses had been paid at the time of the divorce hearing. He also claims the Trial Court erred when it included only 25% of his credit card debt in its calculation of marital debt. The Court's Memorandum Opinion reflects that it found that 75% of the expenses on the credit card bill were business expenses which would have already been treated as tax deductions. The record shows that the husband also listed as marital liabilities expenses that had not been incurred at the time of the trial, such as approximately $75,000.00 for repair of the Harrison property's roof, deck, pool and dock. He also listed as marital debt ongoing expenses such as insurance premiums, property taxes, monthly utility bills, the cost of their child's education and the maintenance fee for the timeshare totaling approximately $34,000.00. The Trial Court correctly discounted all of these items when dividing the marital debt as they do not fit the definition of marital debt as defined by the Tennessee Supreme Court. It is well established that the division or distribution of marital property includes the division of marital debt. *Robertson v. Robertson,* 76 S.W.3d 337, 341 (Tenn. 2002). The Supreme Court discussed the distribution of the marital estate and for the first time provided a definition of marital debt in *Alford v. Alford,* 120 S.W.3d 810, 813 (Tenn.2003):

> "Marital debt" is not defined by any Tennessee statute and has never before been defined by this Court. However, marital debts are subject to equitable division in the same manner as marital property. *Cutsinger v. Cutsinger,* 917 S.W.2d 238, 243 (Tenn. Ct. App.1995); *Mondelli,* 780 S.W.2d at 773. We take this opportunity to define "marital debt" consistent with the definition of "marital property" in

[3] *See Mondelli v. Mondelli,* 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989).

> Tennessee. "Marital property" is defined by statute as "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing a complaint for divorce...." Tenn. Code Ann. § 36-4-121(b)(1)(A) (2001). We now hold that "marital debts" are all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing.

Alford, 120 S.W.3d at 813.

Based on this definition of marital debt, many of the items the husband listed as "liabilities" in his Assets and Liabilities Statement are not marital debts and are not subject to the property division established by the Court. His attorney's fees and litigation expenses are not debts, they were paid for out of the marital estate before trial. The estimated expenses to repair the roof, deck, pool and dock at the Harrison property are not marital debt. These expenses have not been incurred and if they ever are incurred it will not be "during the course of the marriage". As for the insurance premiums, property taxes, monthly utility bills, education costs and the maintenance fee for the timeshare, these are ongoing future expenses that the husband assumed he will incur after the divorce but there was no debt associated with them at the time of trial. The Trial Court specifically did not consider these "liabilities" and stated that they "have already been paid or are reoccurring expenses or adult children expenses and were not considered by the Court". The Trial Court also discounted the husband's credit card debt of $21, 320.00 by 75 % as she found that 75% of that debt was incurred as business expenses and used as a business tax deduction. The husband could not or would not estimate what percentage of the credit card debt was related to his business although he was asked by the Court and the wife's attorney for this information.

> The Court: Is number one or two [credit card debt listed on liability statement] business expense or personal?
>
> The Witness: Probably both.
>
> By Ms. Ramer:
>
> Q. So what portion of number one, Visa credit card, what portion is a business expense?
>
> A. I have no idea**.**
>
> Q. Is all of it?
>
> A. I have no idea.
>
> Q. Is that your business credit card?

A. I have two credit cards and when I travel I don't get reimbursed, you know, for my travel.

Q. Well, I understand that , but you write it off as a business expense.

A. I write it off, yeah**.** I have no idea what the percentage is.

Q. It reduces your income. Do you use both of these credit cards for business purposes?

A. Yes, both of them. You could say 50 percent or you could say 20. I have no idea.

Q. Or it could be 100 percent?

A. No, it wouldn't be 100 percent.

The Trial Judge had to determine what percentage of the credit card debt was marital debt but was not enlightened by the husband, presumably the only person who would have had the information. He claimed to not know the answer and the only concrete answer he gave was that the credit card debt was not 100 percent business debt. The Trial Court, based upon the evidence before her, properly assigned 75 percent of the debt to the business and 25 percent to the marital estate. This issue is without merit.

Next, the husband contends the Trial Court erred when it awarded periodic alimony of $3,500.00 a month to the wife, because it underestimated the wife's earning capacity, and overestimated the earning capacity of the husband and his ability to pay the alimony. He alternatively argues transitional alimony should have been awarded, rather that periodic alimony.

The Trial Court, when awarding $3,500.00 per month in periodic alimony articulated her reasons for finding that "[t]his is a classic case where periodic alimony is warranted" as follows: (1) Ms. Mathias' employment was limited after the marriage; (2) she needed recertification before she could become employed as a registered nurse; (3) she never made more than $20,000.00 and that was in 1978 and; (4) although she intended to work, it was unlikely she would ever "remotely reach the income level of her husband or be able to maintain the lifestyle to which she became accustomed during the marriage". The Court found that the husband's income was over $200,000.00 annually and the amount of periodic alimony was not in error.

A trial court has broad discretion regarding the amount and type of alimony awarded. A determination of alimony is factual and requires a balancing of factors including those listed in § 36-5-121(i)(2005). *Watters v. Watters,* 959 S.W.2d 585, 593 (Tenn. Ct App. 1997)(citing *Aaron v. Aaron,* 909 S.W.2d 408, 410 (Tenn.1995). In general a trial court's decision on alimony will not be disturbed by this Court unless the trial court abused its discretion. *Robertson v. Robertson,* 76

S.W.3d 337, 342 (Tenn. 2002). The Court in *Brown v. Brown,* 913 S.W.2d 163, 169 (Tenn.Ct. App. 1994) discussed the trial court's broad discretion concerning the amount and duration of alimony.

Tennessee Code Annotated § 36-5-121 (2005) provides for the award of alimony to be paid by one spouse to the other following legal separation or divorce. The statute provides for several different classes of alimony including: rehabilitative alimony; periodic alimony, also known as alimony *in futuro*; transitional alimony and; alimony *in solido*, also known as lump sum alimony. While the statute reflects a statutory preference for rehabilitative alimony or transitional alimony, the statutory preference does not displace other forms of spousal support such as periodic alimony, when the circumstances warrant long-term or more open-ended support. Tenn. Code Ann. § 36-5-121(d)(3). *Also See also Aaron v. Aaron,* 909 S.W.2d 408, 410 (Tenn.1995). Tenn. Code Ann. § 36-5-121(d)(3) provides that when the disadvantaged spouse is not capable of economic rehabilitation sufficient to support a reasonable standard of living under the circumstances, the court may award long-term spousal support.

The Tennessee Supreme Court has held that "[t]he two most relevant factors in determining the amount of alimony awarded are the economically disadvantaged spouse's need and the obligor spouse's ability to pay." *Broadbent v. Broadbent,* 211 S.W.3d 216, 222 (Tenn.2006). The concept of relative economic disadvantage incorporates the principles of need and ability to pay. Of these two factors the disadvantaged spouse's need is the threshold issue and the next consideration is the ability of the other spouse to furnish support. *Miller v. Miller,* No. M2002-02731-COA-R3-CV, 2003 WL 22938950 at*3 (Tenn. Ct. App. Dec. 10, 2003).

Tenn. Code Ann. § 36-5-121 directs the courts to take into consideration the different roles spouses may have in a marriage when considering an award of alimony. The statute provides that "[t]he contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage. Further, where one (1) spouse suffers economic detriment for the benefit of the marriage, ... the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties". Tenn. Code Ann. § 36-5-121(c)(2).

A consideration of the Mathias' circumstances and the applicable factors enumerated in Tenn. Code Ann. § 36-5-121(i), particularly the wife's need for support balanced against the husband's ability to provide support, indicates that the Trial Court did not abuse its discretion when it awarded the wife periodic alimony.

The first factor enumerated by the statute is a consideration of the relative earning capacity, obligations, needs and financial resources of each party. The husband has a well established career as a manufacturer's representative and has been self-employed since 1983. His area of expertise is highly specialized and he has started numerous businesses. Four of these

business were active at the time of trial and three of them were doing very well. The Court found that his annual income was at least $200,000.00 a year, and the Court's finding as to his income is not an issue on appeal.

The wife worked as a registered nurse from 1969 to 1980 when the parties' first daughter was born. She worked for very brief periods of time after 1980 and the maximum she ever earned was $20,000.00 in 1979. At trial the wife expressed her intention to seek employment when she regained her certification. The wife estimated that nurses in the Nashville area make between $20,000.00 and $65,000.00 a year, and the husband urged the Court to consider the wife's earning capacity at the high end of her estimate, or $65,000.00 a year. There is no certainty she could obtain such employment given her circumstances. She was fifty-three years old at the time of trial and she has considerable health problems that could significantly impact her ability to perform many physical tasks required of nurses. Further, she has been out of the nursing field for many years and she testified that she could not return to her pre-1980 positions as director of nursing or nurse supervisor as those positions today require advanced degrees.

The husband has a bachelors degree and has many years of experience as a manufacturer's representative in a highly specialized field. The wife has an associate degree in nursing, and as discussed above, needs recertification as she has not worked in many years.

At the time of the divorce, the parties had been married for twenty-eight years.

The wife was fifty-three years old at the time of trial and the husband was one or two years younger. The wife relied on her medical records to establish that she has depression and fibromyalgia. Three of the wife's physicians testified by deposition. The husband testified that he has some arthritis in his knee and that he may need a knee replacement someday. He did not offer any testimony that this condition interfered with his ability to work and he did not produce any medical evidence regarding his knee ailment. The wife has several medical conditions that her radiation oncologist stated are side effects of the radiation therapy she received for treatment of cancer. She has rectal bleeding that varies in severity but can be profound. On some days she needs to use the bathroom ten to twelve times during a morning. She has fatigue and hip pain that were caused by radiation. In addition she has back problems related to several compressed spinal discs. Her oncologist was of the opinion that she needed to limit her activity due to the hip and back problems and should avoid lifting, bending and stooping.

Both parties contributed to the marriage, and as to the relative fault of the parties, the Trial Court stated that both parties were at fault in the divorce, but that the husband was more at fault than the wife. Based on the foregoing, we affirm the award of periodic alimony to the wife in the amount of $3,500.00 a month.

The husband disputes the Trial Court's assignment to him of $15,000.00 for the wife's attorney's fees and $5,795.00 for litigation associated costs such as expert fees, appraiser fees, mediation fees and court reporter fees. He contends that based on the amount of assets awarded to the wife, she was in a position to pay these fees herself.

The award of attorney's fees to a party in a divorce case is largely in the discretion of the trial court, and the appellate court will not disturb it unless an abuse of discretion is found. *Sandlin v. Sandlin* No. M2003-00775-COA-R3-CV, 2004 WL 1237273 at *5 (Tenn. Ct. App. June 3, 2004). Under the abuse of discretion standard, this Court will uphold the ruling of a trial court as long as "reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only if it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining". *Eldridge v. Eldridge,* 42 S.W. 3d 82, 85 (Tenn. 2001).

An award of attorney's fees is appropriate when one spouse is disadvantaged and is unable to pay attorney's fees. *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). Our courts hold that the most important factors in determining an award of attorneys fees are the disadvantaged spouse's need and the advantaged spouse's ability to pay." *Martin v. Martin,* M2002-02350-COA-R3-CV, 2004 WL 833083 at *10 (Tenn. Ct. App. Apr. 16, 2004). The factors provided by the alimony statute weigh in favor of an award of alimony to the wife, as discussed above. The record does not support a finding that the Trial Court's decision was against logic or reasoning, or that it caused an injustice or injury to the husband. Therefore, we affirm the Trial Court's Order that the husband pay $19,000.00 of the wife's litigation related debt.

Finally, the wife requests an award of attorneys fees incurred in defending this appeal. In our discretion we are not inclined to award attorney's fees to the wife. She has sufficient funds from the distribution of the marital property and the award of periodic alimony from which she can pay her attorneys in connection with the appeal.

For the foregoing reasons, we affirm the Judgment of the Trial Court and direct that the stay on the payment of $50,000.00 from the proceeds of the settlement with Volunteer Metal Systems be lifted and the husband is to pay this amount to the wife. We remand with the cost of the appeal assessed to William S. Mathias.

HERSCHEL PICKENS FRANKS, P.J.